Sun World, Inc. *and* Fresh Fruit & Vegetable Workers Local P-78-B, United Food and Commercial Workers International Union, AFL-CIO & CLC. Cases 21-CA-19904, 21-CA-20052, and 21-CA-20110

29 June 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 23 February 1982 Administrative Law Judge Russell L. Stevens issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answer to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union over any and all mandatory subjects of bargaining affecting the unit, including the terms and conditions for a collective-bargaining agreement to replace the one which expired 18 January 1981.

The judge also found that the 60-day provision for preliminary notice as provided for in article XIX of the 1978-1981 contract between the parties was met by the Union; that there was no reasonable basis on which to conclude that the Union wanted, as of the date of its notice of termination on 11 November 1980, to continue working under the 1978-1981 contract; that the Union's notice of termination letter ended with a request for bargaining; that although the contract contained a provision requiring that the 60-day notice was to be followed with a 30-day notice containing a list of proposed changes, the Union's failure to provide a 30-day notice accompanied by a list of proposed changes did not constitute a reversal of the Union's stated desire to terminate the contract; that on timely notice, the Union was free to insist on a total, rather than a partial, change of the contract; and that the record is inadequate to show that the Respondent's conduct constituted a waiver of 30-day notice of a list of proposed changes as provided for in the contract, since regardless of the Respondent's actions relative to negotiating, it is clear that, under the provisions of the contract, the Union could and did terminate the contract effective 18 January 1981.

The Respondent contends that the Union's notice of termination did not satisfy the requirements of article XIX, inasmuch as the Union failed to furnish the Respondent with a list of desired changes within 30 days of the 60-day notice; and that until article XIX of the contract was changed neither party could unilaterally terminate the contract.

The General Counsel contends that the judge erred in rejecting the waiver argument, inasmuch as the Respondent's two RM petitions, which were filed after the window period, and its long period of silence regarding the defect in the notice of union desire to terminate the contract, constituted a waiver; that article XIX is susceptible to a reasonable interpretation which would still require submission of proposed new contract terms where one party, as the Union did, gives notice of its intention to terminate the agreement; and that the Respondent's conduct, subsequent to the notice of termination, precludes it from relying on a defense that the Union failed to provide the Respondent with the proposed changes in the agreement pursuant to article XIX. We find merit in the General Counsel's exception.[2]

In its RM petitions—one filed on 8 January during the insulated period, and the other on 19 January, the day after the contract's expiration date—the Respondent necessarily represented that its agreement with the Union was going to expire or, as of 18 January, had expired. We note the Respondent's reliance on the filing of these representation petitions as its sole basis for refusing to bargain with the Union. Thus we find, in agreement with the General Counsel, that the Respondent itself conceded that the contract was expiring as of 18 January and would pose no bar to the Respondent's RM petition of 19 January.[3]

[1] The General Counsel excepts to the failure of the administrative law judge's proposed Order to provide for bilingual notices to employees, in Spanish and English, in view of the number of the Respondent's employees who are primarily Spanish-speaking. We agree with the General Counsel and shall order that notices be posted in Spanish as well as in English. *Hasa Chemical, Inc.*, 235 NLRB 903 (1978).

[2] Member Hunter does not agree that the Respondent waived its right to assert as a defense the theory that the collective-bargaining agreement renewed itself because of the Union's failure to provide the Respondent with a 30-day notice of proposed changes in the agreement. There is no contention that the Respondent expressly waived its right to assert that theory as a defense. In Member Hunter's view, a party is free to assert any arguably valid defense irrespective of inconsistency with its other legal theories and irrespective of passage of time, so long as the defense is asserted within procedurally required time limits. However, Member Hunter agrees with the judge that the defense of contract renewal, which the Respondent urges to justify its refusal to bargain with the Union, lacks merit for the reasons stated by the judge.

[3] See *Hassett Maintenance Corp.*, 260 NLRB 1211 fn. 3 (1982), where "both parties acted as though the request for modification was effective, and as though the contract had not been renewed." The Board adopted the judge's waiver finding.

Obviously the petition would have been barred had the contract automatically renewed. However, the defect was not asserted by the Respondent until the strike ended in March.

Other evidence we rely on in finding the 8(a)(5) violation is the Respondent's outright encouragement of employee dissatisfaction by Terry Barber, as found by the judge. Barber did not testify. His suggestion to employee Juarez occurred in November.[4] Then in December, when the full crew was working, Barber directed Juarez to bring him a petition before 19 January and to deny that anyone helped her should she be questioned. There is also the call of State Conciliator Hart to Smith on 8 January to arrange a negotiating meeting. Hart was told by Smith that he was available to meet on 12 and 14 January, yet the Union despite prompt followup by persistent calls to Smith's office was unable to confirm a meeting date. Finally, the Respondent in March 1981 granted a wage increase which was not called for by the contract.

In view of the foregoing facts, we find, contrary to the judge, that the Respondent's conduct subsequent to the Union's 60-day notice pursuant to the contract constituted a waiver of the Respondent's defense that the Union failed to follow specific contract provisions in order to forestall the renewal of the 1978–1981 agreement.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sun World, Inc., Thermal, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(f).

"(f) Post at its Thermal, California place of business copies of the attached notice in English and Spanish marked "Appendix." Copies of said notices on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material."

2. Add the attached notice in Spanish marked "Appendice" to the decision of the administrative law judge (omitted from publication).

[4] Barber's suggestion was, according to Juarez: "We the workers of Sun World no longer wish to be represented by a Union." ALJD sec. III, B.

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge. This case was tried in Indio, California, on November 17, 18, 19, and 20, 1981.[1] The charge in Case 21-CA-19904 was filed by Fresh Fruit & Vegetable Workers Local P-78-B, United Food and Commercial Workers International Union, AFL-CIO & CLC (Union) on January 19. The charge in Case 21-CA-20052 was filed by the Union on March 6. The charge in Case 21-CA-20110 was filed by the Union on March 23. On April 30 the Regional Director for Region 21, National Labor Relations Board (Board) consolidated the three cases and issued a consolidated complaint[2] alleging that Sun World, Inc. (Respondent) violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act (Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record[3] of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation engaged in the harvesting, packing, and marketing of vegetables and other crops at its facility located in Thermal, California. In the normal course and conduct of its business operations, Respondent annually sells and ships goods and products valued in excess of $50,000 directly to customers located outside the State of California.

I find that Respondent is, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Fresh Fruit & Vegetable Workers Local P-78-B, United Food and Commercial Workers International Union, AFL-CIO & CLC is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[4]

Prior to May 1978, the facility now owned and operated by Respondent was owned and operated by Maggio-

[1] All dates hereinafter are within 1981, unless otherwise stated.

[2] The complaint was amended at trial, to make minor corrections.

[3] The General Counsel's motion to correct transcript, filed with his brief, was not opposed and is granted.

[4] This background summary is based on stipulations of counsel, and on credited testimony and evidence that is not in dispute.

Tostado, Inc. Approximately in May 1978 Respondent purchased the facility, retained most, if not all, of Maggio-Tostado's employees, and since that date has operated the facility.[5]

Subsequent to an election on March 30, 1977, the Board, on June 8, 1977, certified the Union as the exclusive collective-bargaining representative of employees of Maggio-Tostado, Inc. in the following unit:

> All employees, including receivers, graders, packers, loaders, maintenance employees, truck drivers and all other employees employed by Respondent in receiving, grading, packing and loading carrots and miscellaneous vegetables at its packing house located at 87-400 Avenue 56, Thermal, California; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.[6]

On January 19, 1978, Maggio-Tostado, Inc. and the Union entered into a collective-bargaining agreement, which was assumed by Respondent when it purchased the facility described above. The agreement includes, inter alia, the following provisions:

> ARTICLE X
>
> NO STRIKE, NO LOCKOUT
>
> 1. The Union agrees that during the life of this Agreement, there will be no strikes, slowdowns, or other interruptions of work.
>
> 2. The Company agrees that there will be no lockout during the life of this Agreement.
>
> 3. The parties agree that each may use the provisions of Article V and/or may seek relief from a breach of this Article by the other party directly from a court of competent jurisdiction without proceeding through the Grievance and Arbitration procedure of Article V.
>
> ARTICLE XIX
>
> TERM OF AGREEMENT
>
> This Agreement shall be in full force and effect from January 19, 1978 until January 18, 1981, and from year to year thereafter unless either the Company or the Union desires changes in the Agreement at its expiration date or subsequent annual anniversary dates. In such event, written notice shall be given by the party proposing the changes to the other party to this Agreement sixty (60) days prior to such expiration date and the party desiring changes shall within thirty (30) days from the date of such notice supply the other party with a list of the desired changes.

On November 11, 1980, the Union sent the following letter to Respondent:

> Gentlemen:
>
> Pursuant to Section 8(d)(3) of the Labor Management Relations Act of 1947 and Article XIX of the collective bargaining agreement between your company and this Union, we hereby give notice of termination.
>
> Please advise us when you can be available to meet to commence bargaining.[7]

Mark Nickerson, Respondent's general manager, received the letter and referred the matter to David Smith, Respondent's attorney. Smith did not answer the letter.[8]

As discussed in detail infra, representatives of the Union attempted without success on several occasions after the date of the Union's letter, to get in touch with Smith or some other representative of Respondent.

On January 8 Smith's law firm filed with the Board an RM petition signed by a majority of Respondent's employees, which stated above the signatures: "We the workers of Sun World would no longer wish to be represented by a union we wish to have new elections." The petition was returned by the Board to Smith without being docketed, because it was untimely.

A second RM petition was filed by Smith's law firm on January 19,[9] and was docketed as Case 21-RM-2076. The petition later was dismissed by the Board.

On January 19 Smith and his assistant, Hall, met with Breshears and Ralph Perez, a business agent for the Union, in Smith's office. Employee members of the Union's negotiating team also were present, as were Nickerson and Carlos Teran, one of Respondent's managers. Smith informed the union representatives that he was not going to bargain with them (this is discussed in detail infra), and Breshears told Smith the Union had a petition signed by employees who supported the Union.

Three employee meetings were held in January, attended by more than half of Respondent's employees. Adelaida Romero, a member of the Union's executive board, conducted the meetings. The first meeting of the three at which a strike was discussed was held January 28. Perez and Rod Medlin of the Union also were in attendance. The employees discussed the possibility of a strike, but a strike vote was not taken. The third meeting was held January 30. Romero told the employees Respondent refused to negotiate, and a strike vote was

[5] The fact that Respondent is the successor of Maggio-Tostado, Inc. is not in dispute.

[6] Pursuant to request of the General Counsel, notice is taken of the fact that although the Union still was affiliated with the Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO (Meat Cutters) at the time Respondent recognized the Union, the affiliation changed when the Meat Cutters merged with the Retail Clerks International Union, AFL-CIO & CLC to form the United Food and Commercial Workers International Union, AFL-CIO & CLC.

[7] Jerry Breshears, former secretary-treasurer of the Union, who signed the letter, died prior to trial. The letter is not in dispute. Counsel stipulated that the Union's letter was received by Respondent, Smith, and the California State Conciliation Service. The fact is not in dispute, and it is found, that the Union satisfied the notice requirements of the Act. See *Lindy's Food Center*, 232 NLRB 1001, 1005 (1977).

[8] The fact that the Union gave no proposed list of changes to Respondent pursuant to art. XIX of the contract, quoted above, is not in dispute. Further, the fact is not in dispute that Respondent received no written correspondence from the Union, other than the letter of November 11, 1980.

[9] The bargaining agreement expired January 18.

taken; 68 employees voted to strike and 24 voted not to strike.

A strike commenced February 2, on a Monday. The strike was not successful, and on March 3 the Union's attorney sent to Smith an unconditional telegram offer by all the strikers to end the strike and to return to work on March 4. The telegram listed the strikers, but said the names of strikers were not limited to the list. On March 4 Romero and Breshears went to the plant with 50 or 60 employees, and made an offer on behalf of striking employees for the employees to return to work. The two union representatives spoke with Charles and Terry Barber, two of Respondent's supervisors.[10] Charles Barber asked Romero to leave, and said he would call the police if she did not leave. Romero then asked three employees, Teresa Juarez, San Juana Hernandez, and Emiglia Castro, to replace her, which they did. Terry Barber told the employees there were no openings available, and asked for addresses and telephone numbers of employees desiring to return to work, for possible use if openings later occurred.

None of the employees who offered to return to work were reinstated by Respondent.

On March 8 Respondent, without notification to or bargaining with the Union, unilaterally gave nonstriking employees wage increases retroactive to February 2, 1981.

On March 17 Respondent discharged the striking employees, by the following form letter:

NOTICE OF TERMINATION OF EMPLOYMENT

TO:

YOU ARE HEREBY NOTIFIED THAT YOUR EMPLOYMENT WITH SUN WORLD, INC. IS TERMINATED, EFFECTIVE IMMEDIATELY.

The termination is based upon your participation in the strike against the Company and interruption of work in violation of ARTICLE X of the contract between the Company and the Fresh Fruit and Vegetable Workers, Local P-78-B. ARTICLE X of the contract between the Company and the Union provides in part that there will be *no strike or other interruptions of work* during the term of the contract.

The term of the contract is from January 19, 1978 to January 18, 1981, *and from year to year thereafter.* Both the Company and the Union had the right under the contract to request that changes be made in the terms of the contract before January 18, 1981. The Union *did not request that any changes be made* in the contract, but instead on November 11, 1980, notified the Company that the contract was *to be terminated* on January 18, 1981. The Union had no right under the terms of the contract to terminate it and also did not give proper notice to the Company of any proposed changes in the contract.

SUN WORLD, INC. - THERMAL
By:
General Manager

Contentions of the Parties

The General Counsel contends that the contract of 1978–1981 did not renew itself after the Union's notice to Respondent given on November 11, and that Respondent refused to bargain because of the employee petition on January 18. The General Counsel contends that the petition was the inspiration of, or was aided and encouraged by, Respondent. The General Counsel further contends that the strike was an unfair labor practice strike, and that Respondent's actions in refusing to reinstate, and in later discharging, the strikers were unfair labor practices. Finally, the General Counsel contends that Respondent violated the Act by giving wage increases without first notifying, or bargaining with, the Union.

Respondent contends that it refused to bargain with the Union because the Union failed to comply with a contractual condition precedent, i.e., that no notice of proposed changes in the expiring contract was given to Respondent, and therefore the 1978–1981 contract remained effective. Respondent further contends that the employee petition of January 18 was a valid one, which provided Respondent with reasonable and objective basis to doubt that the Union still represented the employees. Respondent concludes that the strike was in violation of the contract, and that the strikers properly were replaced on a permanent basis and later discharged.

A. *The Issue of Contract Expiration*

It is apparent that the 60-day provision for preliminary notice of desire to terminate the contract was met by the Union. There is no reasonable basis on which to conclude that the Union wanted, as of November 11, 1980, to continue working under the 1978–1981 agreement. The letter ended with a request for bargaining. However, the 60-day notice is to be followed, according to the provision, with a 30-day notice (here, by December 11) containing a list of proposed changes. That list never was given to Respondent by the Union, orally or in writing.

The questions then arise as to whether failure to provide the list constituted a reversal of the Union's stated desire to terminate the contract, and whether Respondent expressly or impliedly waived receipt of the list and acceded to the Union's termination of the contract.

Gloria Rodriguez testified that she attempted on five or six occasions in January, at Breshears' request, to reach Hall, Smith, or Teran by telephone in order to arrange a bargaining session, but she was not successful. She further testified that meetings were arranged for January 14 and 16 but that Smith was unable to, or did not, come to those meetings. Leonardo Islas, a union business agent, testified that he went to Respondent's facility at Breshears' request in December, on a date he did not remember, to find out why Smith did not return Breshear's telephone calls. He said he talked with Teran, who told him Smith "was out of town at the time."

[10] The supervisory status of the two Barbers is not in dispute.

Smith testified: On January 8, he received a telephone call from a man who said he was with the State Mediation and Conciliation Service, and who said he was calling to arrange a meeting to negotiate a new contract between Respondent and the Union. Smith suggested January 12 or 14, but he heard nothing further until Breshears called him on January 14 about attending the meeting that afternoon. Smith said he knew of no meeting, and had other business to attend to that afternoon. They then agreed to meet on January 16, but Smith was ill that day and could not meet. Breshears refused to cancel the meeting and Smith called Nickerson and Teran to meet union representatives in his office at 2 p.m. on January 16. The meeting was held in Smith's office, with Smith not present. The first time Smith met with anyone from the Union was on January 19. During that meeting Smith told the Union that Respondent would not bargain, and the only reason he gave was the RM petition filed with the Board.[11]

Smith later testifed somewhat differently, and stated that, during a telephone conversation on January 14, he told Breshears, "You'd better check your November the 11th, 1980 notice to the Company against the term of agreement provision in the contract. I don't think your notice is good." Breshears asked what Smith meant, and Smith replied, "Your letter was a termination letter. Under our agreement, it's a modification or a change of contract." Breshears said he would check it. During the meeting of January 19:

> When I met with Mr. Breshears, I told him the same thing about the petition that we had. I again told him of the term of agreement provision in the contract, that I didn't—I stated to him that I did not feel that their notice of termination, which was dated November the 11th of 1980 was sufficient to cause a termination of the contract. It called for renewal and modification; that we never received any changes from them and we had this petition. That, based on those two factors, we would not bargain with them on the 19th.

Hall testified: He attended the meeting of January 19, and he overheard Breshears talking with Smith about the Union's 60-day notice and "he [Breshears] was indicating to you that your [Smith's] statement that the notice was defective was merely a red herring."

Discussion

There is no dispute concerning the Union's representative status prior to January 18, 1981. Further, there is no dispute concerning Respondent's refusal to bargain with the Union after expiration of the contract on January 18, 1981. The dispute is whether or not Respondent owed a duty to bargain with the Union on and after January 19, 1981. This discussion relates to Respondent's initial contention, i.e., that the union failed to give it proper contractual notice of a desire to bargain upon expiration of the contract January 18, 1981, and therefore the contract renewed itself by its terms.

Smith and Nickerson testified concerning Respondent's reason for wanting the contract's no-strike provision, and Smith testified concerning why he wanted article XIX to read as it did, but that testimony largely is irrelevant. There was no testimony concerning the actual wording of article XIX of the agreement, or concerning discussion about the wording during negotiations. The article must be taken at its face value.

Respondent contends that the Union cannot terminate the contract but, rather, only can seek to get it changed. That contention patently is unsupportable. The law does not permit a contract without end, and Respondent's contention could result in such a situation. Under such a contract, the Union only could change some of its provisions or forever be bound, unless the contract was terminated by mutual consent.

Further, it is apparent that termination is a "change in the agreement" within the meaning of the contract. Having once agreed to a 3-year term, the Union was free at the end of that time to insist on a total, rather than partial, charge of provisions provided it gave timely notice of its intent, which it did.

So far as the 30-day list of changes is concerned, such a list was not necessary, in view of the total change desired by the Union. Failure to submit the list reinforced the Union's position that it was not interested in partial change of the contract.

The General Counsel argues that Respondent's conduct constituted a waiver of the contractual provision, article XIX, but the record is inadequate to show such a waiver. It may well be that Rodriguez and Islas testified in such manner that Respondent seemed indifferent to negotiations, but Islas' testimony was ambiguous and inconclusive, and Rodriguez' testimony on this point was contrary to that of Smith who was as convincing as Rodriguez. Resolution of the conflict in testimony between Smith (partially supported by Hall and Nickerson) and Rodriquez is not necessary, since regardless of Respondent's actions relative to negotiating it is clear that, under the provisions of the contract, the Union could, and did, terminate that contract effective January 18, 1981.

Respondent argues that several cases, discussed in its brief, support its contention that an improper notice negates a duty to bargain. However, the cases cited by Respondent concern the matter of untimely notice, and are inapposite. An untimely notice is prejudicial, since it creates the possibility of a party taking or receiving action adverse to its former contractual interests, after the time for notice has expired. The courts and the Board traditionally respect contractual provisions relative to times for notices, absent unusual circumstances. This case is on a different footing. The Union's notice was timely. The 30-day provision does not require a list of proposed changes if the entire contract is terminated, since it can be inferred that failure to submit the list means that the Union wanted all the provisions changed. Obviously, the

[11] The testimony is conflicting; some reflects that the petition was filed January 18, and some reflects that it was filed January 19. In either event, the contract was alive by its terms until January 18, thus this conflict need not be resolved. The basic issue is whether or not the contract was terminated by January 18.

Union wanted to bargain for a totally new contract, since it clearly said so in its letter of 60-day notice.[12]

The General Counsel argues that Respondent brought up the defense of improper notice as an afterthought, and that Respondent earlier had avoided bargaining. The record creates those suspicions but, even if such were the facts, they would not affect any finding or conclusion herein. A good defense is not negated by the time of its assertion, and Respondent acknowledges its refusal to bargain.

B. *The RM Petition*

The facts that 108 employees, which were a majority of the unit, signed the petition and that the petition was filed with, and denied by, the Board, are not in dispute. The principal question is whether or not the petition could provide legal basis for Respondent's refusal to bargain with the Union.

A petition of employees, properly prepared and filed, may be evidence of a desire of the employees no longer to be represented by a union. However, a petition that is suggested, initiated, or encouraged by an employer is not acceptable evidence of such an employee desire, and may constitute a violation of the Act. The complaint does not allege that Respondent violated the Act by suggesting, initiating, or encouraging the petition, and the General Counsel stated at trial that no such violation was alleged, or a finding thereof sought. However, such conduct, if it occurred, may be used to show that Respondent did not have a good-faith doubt, based on reasonable and objective considerations, that the employees no longer desired to be represented by the Union.[13]

Juarez testified that she talked with Terry Barber in November 1980:

> I—Terry Barber came to where I was and there was this discussion that he had with another employee of Sun World. I asked him what it was all about. He said that it was those people that thought they were being protected by the Union. And I asked him if there was a way that they could get the Union out. He said that the people had to do it, not them. The employers couldn't do it, but the people could do it if they really did not desire to have the Union in there.
>
> Then he said—why didn't I and some other girls that were going to stay there working longer start a petition? I told them that I didn't believe the people would want to do something like that. He said, "You never know. Why don't you just try it. Talk to some people and see if they decide to help you." That was the first conversation.

Juarez said she talked with Terry Barber again in November about the petition, and Barber said not to start it then, since only a small number of employees then were working. She testified that, in December after the full crew was working, Terry Barber said, "If we were going to do it, to get started now that all the people were there." She said Barber told her:

> Q. Who suggested to you how you could start the petition?
>
> A. Terry Barber.
>
> Q. Do you recall what he told you?
>
> A. The exact words how I could do it?
>
> Q. Yes.
>
> A. "Why don't you say, 'We the workers of Sun World no longer wish to be represented by a Union.'" I said "Is that all?" He said, "You could put whatever else you want." I put, "We wish to have new elections."

Juarez said she then prepared and circulated the petition, with the help of fellow employees. She further testified that Terry Barber assured her, "After I handed in this petition, there would be an immediate election" and that Barber told her on several occasions in December 1980 and January 1981 that "he needed this petition in before January 19, to hand it in to him before that time." On cross-examination, Juarez testified that, on one occasion, Terry Barber told her to deny that anyone helped her with the petition if she were questioned about it, and that, thereafter, she did make such a denial when she was questioned. She also testified that Terry Barber told her the names of some employees who wanted to sign the petition.

Terry Barber did not testify.

Olivia Garcia, one of the unit employees, testified that she talked about the petition with Terry Barber in November 1980. She said Barber initiated the conversation, and:

> He asked me if we had any problems with the Union and if we wanted to get rid of it, to get in contact with the other woman and get some signatures.

Juarez and Garcia were credible witnesses, and their versions of the incidents they related are accepted as accurate. No conflicting accounts need be resolved, since Terry Barber did not testify. Based on the testimony of Juarez and Garcia it is clear, and it is found, that Respondent actively participated in, and encouraged, the employee petition filed by Smith. As a legal matter, Respondent cannot rely on that petition as evidence that Respondent's employees no longer desired to be represented by the Union.

Much trial time was devoted to a matter incidental to the employee petition. At the meeting in Smith's office on January 19, the Union advised Smith that it held a "counter petition" signed by more employees than signed the petition filed by Smith.[14] Breshears suggested at the meeting that, rather than having an election as Respondent wanted, the two petitions be compared, and signatures verified, to determine whether or not a majority of employees wanted the Union to represent them. Breshears argued that, if there already were a contract in ex-

[12] Cf. *Mason City Builders Supply Co.*, 193 NLRB 177 (1971).

[13] *NLRB v. Cornell of California*, 577 F.2d 513 (9th Cir. 1978); *Warehouse Market*, 216 NLRB 216 (1975).

[14] G.C. Exh. 13.

istence, as contended by Smith, an election was not necessary.[15] Smith and Hall argued that an election could be held, because the contract term was for 3 years. This subject is irrelevant to any issue since it is clear, as discussed above, that Respondent refused to bargain with the Union, partially because of the matter of allegedly defective notice and partially because of the employee petition.

C. *The Nature of the Strike*

It is found, above, that Respondent refused to bargain with the Union in violation of the Act. The employees went out on strike solely because of Respondent's refusal to bargain. Respondent contends that the strike was in violation of the contractual provision quoted above, but does not argue the proposition that, if Respondent unlawfully refused to bargain for a new contract, the strike was anything other than an unfair labor practice strike.

It is clear, and found, that Respondent's employees engaged in an unfair labor practice strike, as alleged in the complaint.

D. *Respondent's Unilateral Wage Increase*

The fact of a unilateral wage increase given by Respondent, retroactive to February 2, 1981, and paid on March 8, 1981, is not in dispute. At the time of the increase the Union represented Respondent's employees, and wages constitute a mandatory subject of bargaining. Respondent did not bargain, or offer to bargain, with the Union concerning the increase. Based on those facts, Respondent violated Section 8(a)(5) and (1) of the Act.

E. *Respondent's Refusal to Reinstate, and its Discharge of, Employees*

The facts that Respondent refused to reinstate the striking employees on their unconditional offer to return to work on March 4, and that Respondent subsequently discharged at least 48 striking employees on March 11, are discussed above, and are not in dispute. Nor is there dispute about the fact of record showing that, between March 9 and April 9, Respondent hired at least 42 employees to replace discharged strikers.

Respondent offered at trial only one reason for its discharge of the striking employees, and that reason, not in dispute, was that they were discharged because they engaged in a strike.[16] As shown above, the strike was caused by Respondent's unfair labor practices.

Respondent's refusal to reinstate striking employees, and its later discharge of those employees because of their engagement in an unfair labor practice strike, violated Section 8(a)(5) and (1) of the Act, as alleged.

F. *Respondent's Refusal to Pay the Retroactive Wage Increase to Employees Engaged in the Unfair Labor Practice Strike*

Maria Zamorez began working for Respondent as a grader in December 1980, for the 1980–1981 harvesting season. When the strike commenced, Zamorez was on sick leave. She returned to work on February 16, and worked until the middle of the day on February 23, when she joined the strike.

Prior to February 23, Zamorez' wage rate had been $3.80 per hour. Although she was not advised in advance that she would be receiving a wage increase, Zamorez was paid at a rate of $4.40 per hour in her check for the 4 hours worked on February 23.

After March 8, when the retroactive portion of the wage increase was paid, as described above, Zamorez was informed by relatives who had started working for Respondent on February 3 that Respondent was paying the 60-cent-per-hour wage increase retroactive to February 2. Because Zamorez had not received such a check, she went in March with Juarez and Hernandez to Respondent's facility to find out whether Respondent was holding a check for her retroactive pay.

Zamorez spoke at the facility with Terry Barber, in the presence of Juarez and Hernandez. Zamorez asked Barber if there was a check for her retroactive pay. Barber responded that he did not know, and he went inside the plant to find out. When Barber returned, he told Zamorez there was no check for her. Zamorez asked why not, and said she was eligible for the retroactive pay which had been paid to everyone else. Barber replied that he did not know, but that, if they did not leave, he would have them arrested. The employees left, and Zamorez never has received a check for her retroactive pay.

Respondent offered at trial no reason for refusing to pay Zamorez retroactive wages. Because of her status as a strike participant, and because of Respondent's unfair treatment of all strikers, as discussed above, there is a clear and strong inference, which hereby is drawn, that Zamorez was not paid retroactive wages because of her strike participation. Such discrimination is a violation of Section 8(a)(3) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Sun World, Inc. is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Fresh Fruit & Vegetable Workers Local P-78-B, United Food and Commercial Workers International Union, AFL-CIO & CLC is, and at all times material herein has been, a labor organization within the meaning of the Act.

3. The Union is, and at all times material herein has been, the exclusive representative of Respondent's employees in the following appropriate unit:

> All employees, including receivers, graders, packers, loaders, maintenance employees, truck drivers and all other employees employed by Respondent in receiving, grading, packing and loading carrots and miscellaneous vegetables at its packing house located at 87–400 Avenue 56, Thermal, California; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

[15] This statement is from the testimony of Perez, and is credited. Hall testified to the same effect.

[16] See G.C. Exh. 10, quoted supra.

4. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize the Union as the exclusive collective-bargaining agent of the employees in the above-described unit, and failing and refusing to bargain in good faith with the Union over any and all mandatory subjects of bargaining affecting the unit, including the terms and conditions for a collective-bargaining agreement to replace the one which expired January 18, 1981; and unilaterally granting to nonstriking employees wage increases retroactive to February 2, 1981, without notifying or bargaining with the Union.

5. Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate employees engaged in an unfair labor practice strike against Respondent on their unconditional offer to return to work, said strikers being those listed in General Counsel's Exhibit 15 and any employees similarly situated; discharging said unfair labor practice strikers; and refusing to pay Maria Zamorez and other of Respondent's employees similarly situated the retroactive wage increase described above, for work performed on and after February 2, 1981.

THE REMEDY

Having found that Respondent violated Section 8(a)(5), (3), and (1) of the Act, it is recommended that Respondent be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Sun World, Inc., Thermal, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Violating Section 8(a)(5) and (1) of the Act by failing and refusing to recognize the Union as the exclusive collective-bargaining agent of the employees in the appropriate unit, and failing and refusing to bargain in good faith with the Union over any and all mandatory subjects of bargaining affecting the unit, including the terms and conditions for a collective-bargaining agreement to replace the one which expired January 18, 1981; and unilaterally granting to nonstriking employees wage increases retroactive to February 2, 1981, without notifying or bargaining with the Union, *provided*, that nothing herein shall be construed to require Respondent to rescind any wage increases given unilaterally in violation of the Act.

(b) Violating Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate employees engaged in an unfair labor practice strike against Respondent, on their unconditional offer to return to work, said strikers being those listed in General Counsel's Exhibit 15, and any employees similarly situated; discharging said unfair labor practice strikers; and refusing to pay Maria Zamorez and other of Respondent's employees similarly situated the retroactive wage increase described above for work performed on and after February 2, 1981.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately recognize the Union and, on request, bargain collectively in good faith with it over any and all mandatory subjects of bargaining.

(b) Offer immediate and full reinstatement to the individuals listed in General Counsel's Exhibit 15, and others similarly situated, to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without loss of seniority or other rights and privileges, discharging if necessary any replacements for these employees, and make said discharged employees whole for any loss of earnings they may have suffered, by payment to each of them the moneys which each of them would have earned during the period from March 4, 1981, to the date of Respondent's offer of reinstatement, less the employee's net earnings during that period, with interest to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

(c) If Respondent has not reinstated all individuals listed in General Counsel's Exhibit 15, and others similarly situated, because of the seasonal nature of its business, when Respondent resumes operation of its business, all individuals listed in General Counsel's Exhibit 15, and others similarly situated, who have not been rehired, shall be hired to fill their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without loss of seniority or other rights and privileges, in preference to all other persons.

(d) Make Maria Zamorez, and all others similarly situated, whole for the retroactive portion of wage increases which Respondent failed and refused to pay them, with interest as described above.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, and social security payments records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of the Order.

(f) Post at its Thermal, California facility copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Rea-

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.